

ISSUES

The sole issue to be considered by the Appeals Board is whether the claimant is a statutory employee of the respondent, Farmland Foods, Inc., pursuant to K.S.A. 44-503.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds as follows:

A decision finding that the claimant is a statutory employee of the respondent is subject to review by the Appeals Board as it raises the jurisdictional issue as to whether the claimant's accidental injury arose out of and in the course of employment with respondent. See K.S.A. 44-534a(a)(2).

In reviewing this case, the Appeals Board has to first address the question as to whether an employment relationship existed on the date of the alleged accident between the claimant and R & R Pallets (R & R), an uninsured respondent. Claimant began working for R & R sometime during the latter part of September 1993 and worked until he injured his left foot when he stepped on a nail on November 12, 1993. On the date of his accident, he notified the owner of R & R, James W. Dustin, of his injury. Claimant first received medical treatment for his injury at the emergency room of St. Joseph Hospital in Wichita. The next day, however, he returned to the hospital because of increased symptoms and was admitted as an inpatient and treated for seven days. As of the date of the Preliminary Hearing held August 1, 1994, claimant had been under continuous medical treatment, having had two surgeries, and was requesting authorization for a third surgery.

In November 1993, James W. Dustin, owner of R & R, had orally contracted with Farmland Foods, Inc. (Farmland) to maintain and repair wooden pallets at the Farmland plant in Wichita, Kansas. Wooden pallets were used to ship the processed and packaged meat products that were produced at this plant. The pallets were repaired on Farmland property, utilizing tools supplied by both R & R and Farmland.

Claimant was employed by Mr. Dustin in the latter part of September 1993 to repair pallets at the Farmland location. Mr. Dustin testified that the claimant was told he was being employed as an independent contractor and that he would be responsible for his own insurance. However, claimant testified that he was paid \$5.50 per hour and was expected to work a full forty-hour week. Claimant established that he was trained to repair the pallets by Mr. Dustin and a fellow employee. The tools claimant used in repairing the pallets were owned by both R & R and by Farmland. Claimant was not required to furnish any tools. Claimant further testified that he was not free to go and come as he wanted. In fact, he was required to work 8-5 with an hour off for lunch, five days per week. Claimant was also required to call in if he was going to have to miss work. Mr. Dustin testified that claimant was required to repair the pallets in accordance with Farmland's specifications. Mr. Dustin also established that he instructed the claimant to repair the pallets better and faster on numerous occasions.

Whether an employer/employee relationship exists or a person is an independent contractor, the most significant factor to consider is the employer's right to direct and control the method and manner of doing the work. In fact, the right to control is more important than the actual exercise of control. Although the right to control is the most significant factor, other considerations indicative of an employer/employee relationship are the employer's right to discharge, payment made by the hour rather than by the job, and

furnishing of equipment. Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965). The Appeals Board finds that the claimant has proven through his testimony and the testimony of James W. Dustin, owner of R & R, that he was an employee for purposes of coverage under the Kansas Workers Compensation Act and not an independent contractor as argued by both Farmland and R & R.

The Administrative Law Judge, in her opinion, not only found that the claimant was an employee of R & R, but also found that the claimant was a statutory employee of the respondent, Farmland, in accordance with K.S.A. 44-503. She then ordered Farmland, as a statutory employer, to provide the requested benefits to the claimant.

K.S.A. 44-503(a) extends the application of the Workers Compensation Act to certain individuals who are not the immediate employers of the injured worker. Hollingsworth v. Fehrs Equip. Co., 240 Kan. 398, 402, 729 P.2d 1214 (1986). In the instant case, the evidence established that R & R contracted with Farmland to repair and maintain wooden pallets owned by Farmland. Having also found that the claimant was an employee of R & R, claimant would then be provided with coverage under the Act, if the work that R & R performed was a part of Farmland's trade or business, as required by K.S.A. 44-503(a).

The test to determine whether the work performed by R & R was a part of Farmland's trade or business is set forth in the case of Hanna v. CRA, Inc., 196 Kan. 156, 159-160, 409 P.2d 786 (1966), as follows:

“... (1) is the work being performed by the independent contractor and the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work being performed by the independent contractor and the injured employee such as would ordinarily have been done by the employees of the principal?

“If either of the foregoing questions is answered in the affirmative the work being done is part of the principal's ‘trade or business,’ and the injured employees sole remedy against the principal is under the Workmen's Compensation Act.”

The Kansas Supreme Court made a further analysis of the Hanna test in the case of Bright v. Cargill, Inc., 251 Kan. 387, 399, 837 P.2d 348 (1992) by stating the following:

“The first test of Hanna, whether the work is inherent in and an integral part of the principal's trade or business, asks what other similar businesses do. Applied to the case at bar, would a similar grain elevator do the work at issue through employees or contract the work to millwrights? Overlap with the second test of Hanna (whether the particular principal would normally do the work through its own employees) may occur. Even if other similar businesses would not perform the work through employees, the particular principal may make such work ‘a part of its trade or business’ by its own past actions.”

The Appeals Board finds that the evidence as a whole in this case does not satisfy the Hanna test. Accordingly, a statutory employee/employer relationship between Farmland and the claimant did not exist. Farmland is in the business of processing and producing meat products. Wooden pallets are utilized by Farmland only in shipping these

products. Repair work that was performed by R & R on the wooden pallets has no association with the production of the meat products. Even though, at one time, Farmland did attempt to repair their own pallets, no employees at the time of the Preliminary Hearing were presently performing such repair. Additionally, evidence was presented that other industries that ship products on wooden pallets did not have their own employees repair the pallets. Accordingly, the Appeals Board disagrees with the finding of the Administrative Law Judge that a statutory employee/employer relationship existed between the claimant and Farmland. Therefore, claimant's request for preliminary compensation benefits against Farmland is denied.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl, dated September 8, 1994, should be, and the same is hereby, reversed and the benefits requested by claimant against the respondent, Farmland Foods, Inc., are denied. The issue of respondent's, R & R, liability for requested compensation benefits was not before the Appeals Board. The case is therefore remanded for determination of this issue.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, Kansas
Edward D. Heath, Jr., Wichita, Kansas
Andrew E. Busch, Wichita, Kansas
James R. Roth, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director